

REMARKS

This is a full and timely response to the final Office Action mailed January 14, 2010 which replaced the previous final Office Action mailed November 18, 2009 (withdrawn). Applicants appreciate the withdrawal of the 35 U.S.C. 112 rejections, first and second paragraphs. Reexamination and reconsideration in view of the foregoing Amendments and following remarks is respectfully solicited.

Claims 35-36 and 38-39 remain pending in this application, with claims 35 and 38 being the independent claims. Claims 1-34 were previously canceled. Claims 35-36 and 38-39 have been amended. Claims 37 and 40 have been canceled. No new matter is believed to have been added. The amendments and remarks are believed to be fully responsive to the Final Office Action mailed January 14, 2010 and to render the claims at issue patentably distinct over the cited references and in condition for allowance.

Rejection Under 35 U.S.C. 103(a)

Claims were again rejected under 35 U.S.C. 103 as allegedly being unpatentable over FR 2471775, published June 26, 1981 by Koulbanis et al. (hereinafter "FR 2471775A") in view of U.S. Patent No. 6,280,746 issued on August 28, 2001 to Arquette et al. (hereinafter "Arquette"). This rejection is respectfully traversed.

Amended independent claim 35 is directed to a method for preparing a topical formulation. The method comprises the steps of obtaining a composition comprising alkali salts of jojoba fatty acids and non-polar unsaponifiabiles totaling 100 percent by weight from saponified jojoba oil. The saponified jojoba oil comprises at least 6 weight percent non-polar unsaponifiabiles prior to saponification. The gelling agent in said topical formulation is neutralized with an effective amount of said composition.

Amended independent claim 38 is directed to a method for preparing a topical application. The method comprises obtaining a composition comprising a mixture of alkali salts of jojoba fatty acids present in an amount of about 55 percent by weight of the composition and long carbon chain unsaponifiable material present in an amount of about 45 percent by weight of the composition. The long carbon chain unsaponifiable material is obtained from saponified jojoba oil. The saponified jojoba oil comprises at least 6 weight percent long carbon chain unsaponifiable material prior to saponification. The long carbon chain unsaponifiable material comprises at least 18 carbons in length. An acid gelling agent in a topical formulation is neutralized with an effective amount of the composition.

The Examiner argued, for the first time, in Final Rejections (Final Rejection mailed November 18, 2009 (now withdrawn) and the instant Final Rejection) that Arquette has a 35 U.S.C. 102(b) date and that the instant claims qualify only for a priority date of June 30, 2003, the filing date of the instant application. Applicants do not concede that Arquette has a 35 U.S.C. 102(b) date and that the instant claims qualify only for a priority date of June 30, 2003, the filing date of the present application, as asserted by the Examiner. However, Applicants submit that their amended claims are patentably distinguishable from FR 2471775 in view of Arquette and that rejection of the claims should be withdrawn.

The Examiner characterizes FR 2471775A as “teach[ing a] composition comprising unsaponifiable fractions obtained from vegetables oils and suggested jojoba oil, however, the reference does not explicitly teach hydrolysis of the oil” (Office Action, p. 5). The Examiner relies upon Arquette as teaching the claimed hydrolyzed jojoba oil esters concluding that “it would have been obvious to one having ordinary skill in the art the time of the invention to provide gel cosmetic composition comprising saponifiable and unsaponifiable fractions as

disclosed by FR '775 and select jojoba oil suggested by the reference and further use hydrolyzed jojoba oil esters as disclosed by US '746." Applicants traverse the rejection.

FR 2471775A describes and claims a cosmetic oil having a specific composition, namely jojoba oil and sunflower oil combined with an insaponifiable fraction extracted from soy and avocado oil. The cosmetic oil of FR 2471775A does not contain an insaponifiable fraction extracted from jojoba oil—the insaponifiable fraction extracted in FR 2471775A is solely from soy and avocado oil. There are no jojoba hydrolysates in FR 2471775A and no suggestion for their inclusion. Thus, there is no suggestion in FR 2471775A for hydrolyzing or otherwise reacting the jojoba oil there. Therefore, regardless of whether Arquette describes hydrolyzed jojoba esters, which Applicants maintain it does not as argued below, the combination is inappropriate. There is absolutely no basis for combining FR 2471775A with Arquette. "If the proposed modification or combination of the prior art would change the principle of operation of the prior art invention being modified, then the teachings of the references are not sufficient to render the claims prima facie obvious. In re Ratti, 270 F.2d 810, 123 USPQ 349 (CCPA 1959); MPEP 2143.01. The court in In re Ratti reversed the rejection there holding the "suggested combination of references would require a substantial reconstruction and redesign of the elements shown in [the primary reference] as well as a change in the basic principle under which the [primary reference] construction was designed to operate." 270 F.2d at 813, 123 USPQ at 352.). Here, substituting hydrolyzed jojoba oil esters into the cosmetic oil of FR 2471775A would be an inappropriate complete redesign of the composition described and claimed therein. Thus, Applicants submit that FR 2471775A has been improperly combined with Arquette.

Moreover, Arquette does not describe the products of saponified jojoba oil or a composition comprising a mixture of about 55 percent by weight alkali salts of jojoba fatty acids and about 45 percent by weight non-polar unsaponifiables (Claim 38) totaling 100 percent by weight (Claim 35) as now more clearly claimed in Applicants' amended independent claims 35 and 38. Support for the claim language may be found in Applicants' Specification, p. 14, lines 7-9 as discussed below and thus is not new matter. "Saponification" is defined in Applicants' Specification (p. 2, lines 14-16) as "the hydrolysis reaction between a wax, oil or fat with an alkali metal or alkaline earth metal hydroxide to form the corresponding metallic salt soap." At p. 14, lines 7-9, hydrolysates of refined jojoba oil are described as "nearly a 55:45 [totaling 100] mixture of polar hydrophilic long chain salts (alkali salts) and relatively non-polar lipophilic materials (fatty alcohols). The lipophilic fraction is the unsaponifiable materials according to the definition used in this document."

By contrast, Arquette instead describes alcoholysis and a transesterification reaction between jojoba oil and an alcohol that yields randomized jojoba wax esters, fatty alcohols and alkyl esters. In each base-catalyzed alcoholysis reaction described in Arquette in Column 4, lines 1-48, alcohol (I) is combined with jojoba wax esters (II) (Reaction A), fully hydrogenated jojoba wax esters (III) (Reaction B), or both (Reaction C) to yield mixtures containing IIr (Reaction A) (Col. 4, line 36), IIIr (Reaction B) (Col. 4, line 39), or both IIr and IIIr (Reaction C)(Col. 4, lines 42-43), the "r=the randomized distribution of wax esters resulting from rearrangements which occur during the reactions." (Col. 4, lines 46-48).

More specifically, saponification (Applicants) and alcoholysis/interesterification (Arquette) yield different products. Saponification of jojoba oil breaks the ester bond between the jojoba fatty acids and the jojoba alcohol in the jojoba oil to yield the alkali salts of the

jojoba fatty acids and the non-saponifiables (jojoba alcohol), *i.e.*, the jojoba alcohol is released from the jojoba fatty acids during saponification. With saponification, there is no reassembly of the ester linkage to generate randomized, interesterified wax esters, as produced in Arquette and discussed above. The randomized wax esters in Arquette also are a part of the total 100 percent, unlike Applicants' claimed method.

Therefore, Applicants' amended independent claims 35 and 38 are patentably distinguishable from FR 2471775A in combination with Arquette, and reconsideration and withdrawal of the 35 U.S.C. 103 rejection is requested. Claims 36 and 39 depend from these independent claims and therefore also are not obvious. Claims 37 and 40 have been canceled. The 35 U.S.C. 103 rejection of claims 35-40 should therefore be withdrawn.

CONCLUSION

Based on the foregoing, amended independent claims 35 and 38 are patentable over the citations of record. The dependent claims are also deemed patentable for the reasons given above with respect to the independent claims. Hence, Applicants respectfully submit that the present application is in condition for allowance, and such allowance is therefore earnestly requested. Should the Examiner have any questions or wish to further discuss this application, Applicants request that the Examiner contact the Applicants' attorneys at the below-listed telephone number.

If for some reason Applicants have not requested a sufficient extension and/or have not paid a sufficient fee for this response and/or for the extension necessary to prevent abandonment on this application, please consider this as a request for an extension for the required time period and/or authorization to charge Deposit Account No. 50-2091 for any fee which may be due.

Respectfully submitted,

INGRASSIA FISHER & LORENZ, P.C.

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By: /JANINE RICKMAN NOVATT/

Janine Rickman Novatt

Reg. No. 32,593

(480) 361-0466

Customer No. 77037